In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1179

JOHN C. DANFORTH, ATTORNEY GENERAL,
STATE OF MISSOURI, *Appellant*,

vs.

ROBERT DEAN MATTIS, M.D., *Appellee*,

vs.

RICHARD R. SCHNARR and ROBERT MAREK,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JURISDICTIONAL STATEMENT

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INDEX

Table of Citations

CASES

STATUTES

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No. .....

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JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the United States Court of Appeals for the Eighth Circuit, entered on December 1, 1976, reversing a decision of the United States District Court for the Eastern District of Missouri, Eastern Division, and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS BELOW

The opinion of the District Court for the Eastern District of Missouri, Eastern Division, is reported at 404 F.Supp. 643. The opinion of the Court of Appeals for the Eighth Circuit is not yet reported. Copies of the opinion and dissenting opinion of the Court of Appeals are attached hereto as Appendix A.

JURISDICTION

This suit was brought under 28 U.S.C. §§1343(4), 2201, 2202 and 42 U.S.C. §§1983 and 1988, to declare unconstitutional §§544.190 and 559.040 of the Revised Statutes of Missouri. The judgment of the District Court was entered on October 7, 1975. Appeal was taken to the United States Court of Appeals for the Eighth Circuit. Judgment of the Court of Appeals for the Eighth Circuit was entered on December 1, 1976. Notice of appeal was filed in that court on December 21, 1976. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1254(2) and 2101 (c). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case. *Watson* v. *Employers Liability Assurance Corporation*, 348 U.S. 66; *United Gas Pipe Line Company* v. *Ideal Cement Company*, 369 U.S. 134; *Dutton* v. *Evans*, 400 U.S. 74.

QUESTIONS PRESENTED

Are §§544.190 and 559.040 of the Revised Statutes of Missouri, which provide, (1) that police officers, after notifying a defendant of their intention to arrest, may use all necessary force to effect the arrest if the defendant flee, and (2) that all homicides, necessarily committed in attempting by lawful ways to apprehend any person for any felony committed are justifiable, unconstitutional as a denial of due process secured by the Fourteenth Amendment to the United States Constitution?

Are the above Missouri statutes unconstitutional as a violation of equal protection of law, secured by the Fourteenth Amendment to the United States Constitution?

Are the above Missouri statutes unconstitutional as an infliction of cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution?

STATUTES INVOLVED

§544.190. *"Rights of officer in making arrests.*—If, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all necessary means to effect the arrest." Revised Statutes of Missouri, 1969, Vol. 4, p. 3976.

§559.040. *"Justifiable homicide.*—Homicide shall be deemed justifiable when committed by any person in either of the following cases:

(1) In resisting any attempt to murder such person, or to commit any felony upon him or her, or in any dwelling house in which such person shall be; or

(2) When committed in the lawful defense of such person, or of his or her husband or wife, parent, child, brother, sister, uncle, aunt, nephew, niece, master, mistress, apprentice or servant, when there shall be reasonable cause to apprehend a design to commit a felony, or to do some great personal injury, and there shall be reasonable cause to apprehend immediate danger of such design being accomplished; or

(3) When necessarily committed in attempting by lawful ways and means to apprehend any person for any felony committed, or in lawfully suppressing any riot or insurrection, or in lawfully keeping or preserving the peace." Revised Statutes of Missouri, 1969, Vol. 4, p. 4068.

STATEMENT

Appellee was the father of Michael C. Mattis, who was shot to death by police officer Robert Marek. The facts surrounding this shooting were stipulated by the parties as follows: Michael Mattis and a companion were observed by Marek and patrolman Richard Schnarr leaving the office of a golf driving range in Creve Coeur, Missouri, at approximately 1:20 a.m. on November 30, 1971. Both officers had been advised by radio of a burglary in progress at this location. Schnarr arrived first and observed inside the building two persons who fled through a rear window. Officer Marek arrived shortly after Schnarr and also observed the two persons leaving the building. Schnarr called upon the two to halt, but Mattis and his companion ran in different directions. Schnarr fired a warning shot in the air and when both continued running, fired a shot in the direction of Mattis's companion which missed. Marek collided with Mattis as he came around the side of the building. Both fell to the ground and Marek grabbed Mattis's leg. Mattis broke free and ran up the inclined parking lot toward the street. Officer Marek pursued and shouted, "Stop, or I'll shoot." Mattis continued running and when the distance between the two reached approximately 100 to 125 feet, Marek fired one shot, which he would testify was aimed well above Mattis. Mattis, however, was struck in the head and killed. Mattis's companion was later apprehended and stated that he and Mattis had broken into the building to steal money.

Appellee, Robert Mattis, father of the deceased, filed on January 1, 1972, a suit in the United States District Court for the Eastern District of Missouri, pursuant to 42 U.S.C. §§1983 and 1988. An amended complaint was filed on February 1, 1972. Plaintiff sought damages and a declaration that §§544.190 and 559.040, Revised Statutes of Missouri, 1969, were unconstitutional. On January 16, 1973, the District Court entered an opinion which held that although the plaintiff had standing, his suit was barred by the police officer's good faith reliance upon the Missouri statutes. On a motion for new trial the District Court rejected plaintiff's argument that even if the damage claim was barred, the court should reach the declaratory judgment issue. On July 16, 1973, the District Court overruled the motion for a new trial and held that the plaintiff could not assert the civil rights of his son and that declaratory relief was inappropriate. Notice of appeal was filed on July 27, 1973. On the appeal to the Court of Appeals for the Eighth Circuit the case was reversed and remanded. In an opinion filed August 23, 1974, the court held that plaintiff did have standing to obtain declaratory relief on the validity of the Missouri statutes. *Mattis* v. *Schnarr*, 502 F.2d 588 (8th Cir. 1974). This opinion of the Court of Appeals was not contested.

On remand, the plaintiff filed a second amended complaint on December 13, 1974, in which he dropped the claim for damages. On January 21, 1975, the Attorney General of the State of Missouri was allowed to intervene for the purpose of defending the constitutionality of the Missouri statute. The case was taken under submission on the stipulation of facts agreed to by the parties. In an opinion entered on October 7, 1975, the District Court held that the Missouri statutes were not in violation of the United States Constitution and entered judgment for the defendants. Notice of appeal was filed on November 3, 1975.

On appeal, the Court of Appeals for the Eighth Circuit reversed the judgment of the District Court and held that §§544.190 and 559.040 of the Revised Statutes of Missouri, 1969, violated the plaintiff's right to due process under the Fourteenth Amendment to the United States Constitution. This opinion was filed on December 1, 1976. Notice of appeal was filed on December 21, 1976. A stay was sought and granted on January 4, 1977.

THE QUESTIONS ARE SUBSTANTIAL

The issues involved in this appeal concern the constitutionality of state statutes authorizing the use of potentially deadly force by police officers to effect the apprehension of felons fleeing from arrest. Such statutes are codifications of the common law and, as noted in both the principal and dissenting opinions below, at least 24 states have statutes following this common law rule. The constitutional validity of these statutes is a matter of great concern to all of these states. The holding that these statutes are unconstitutional would not only drastically affect the scope of potential liability in civil rights actions under 42 U.S.C.

§1983, but reaches the very effectiveness of law enforcement activities on the part of the states. Police officers are privileged to employ force in certain circumstances because a policy decision has been made that it is necessary for the performance of their duties. *State* v. *Nolan*, 192 S.W.2d 1016 (Mo. 1946). Any decision reducing the scope of use by police officers would necessarily touch upon their effectiveness in carrying out the duties imposed upon them.

The Court of Appeals held that the statutes in question worked a deprivation of the fundamental right of life without due process, in violation of the Fourteenth Amendment. The District Court found that the right to life was not involved. The District Court found that the statute placed its burden not upon life but upon flight from a lawful arrest. The District Court found, therefore, that the statute did not infringe upon any constitutionally protected right. A similar position was taken by a three-judge court in the case of *Cunningham* v. *Ellington*, 323 F.Supp. 1072 (W.D. Tenn. 1971). Appellant submits that the latter is a more appropriate analytical model since death does not result each time a police officer employs a firearm. To hold that the right to life is denied by the Missouri statutes ties the court's opinion to the particular outcome in a particular case. As was stated in *Howell* v. *Cataldi*, 464 F.2d 272 (3rd Cir. 1972), the extent of injuries received does not determine the constitutionality of the force employed. *Howell* indicates that the proper standard is whether the application of force exceeds what is reasonable and necessary under the circumstances. However, §544.190, Revised Statutes of Missouri, 1969, authorizes only that degree of force which is reasonably necessary to effect an arrest. The statute specifically requires (1) that the arresting officer give notice of his intention to arrest, (2) that the suspect either flee or forcibly resist, and (3) that the force em-

ployed be necessary. In addition, it has been held that the officer must have probable cause to believe that the suspect has committed a crime. As noted by the dissent below, these are factors not recognized or dealt with by the majority opinion. Yet these provisions of the Missouri statutes make it clear that the unnecessary and unreasonable use of force is not authorized. Appellant submits that this is sufficient to meet the applicable constitutional standards.

The majority opinion, while ignoring the above provisions, states that "the statute creates a conclusive presumption that all fleeing felons pose a danger to the bodily security of the arresting officers and of the general public." Appellant submits that this is completely erroneous. That such a presumption arises only from the majority's unfounded assumption that the only justification for police use of firearms is a threat to the "bodily security" of the officer or the public. The dissent, however, fully recognizes the state interests involved, which include effective law enforcement, apprehension of criminals, prevention of crime and protection of the public. Similar state interests were acknowledged by the Second Circuit in *Jones* v. *Marshall*, 528 F.2d 132, 142 (2nd Cir. 1975), wherein the court stated:

> ". . . This would seem peculiarly to be one of those areas where some room must be left to the individual states to place a higher value on the interest in this case of peace, order, and vigorous law enforcement, than on the rights of individuals reasonably suspected to have engaged in the commission of a serious crime."

Thus, not only is the majority incorrect in finding that the statute creates a conclusive presumption, but it is also incorrect in failing to recognize the valid state interests involved.

The decision of the Court of Appeals represents a marked departure from the previous decisions of other federal courts. Uniformly, other courts which have considered the constitutionality of statutes similar to Missouri's, have upheld them. *Jones* v. *Marshall, supra; Beech* v. *Melancon,* 465 F.2d 425 (6th Cir. 1972), *cert. den.*, 409 U.S. 1114 (1973); *Cunningham* v. *Ellington,* 323 F.Supp. 1072 (W.D.Tenn. 1971) (three-judge court). Thus, the decision of the Court of Appeals below produces a clear conflict in decisions of the lower federal courts. Appellant submits that on an issue of this importance, such a conflict must be resolved. As noted above, the court's decision affects potential liability for damages and the effectiveness of law enforcement activities in general. The fact that there is a conflict between the lower federal courts only accentuates the problems. The conflict would almost certainly lead to inequities in potential liability for damages. There is no justification for subjecting police officers in various jurisdictions to varying standards of conduct. In addition, there is no justification for such a variance with regard to a rule which can produce such a severe and adverse impact upon the effectiveness of police activities. Appellant strongly submits that it is necessary for this court to resolve the conflict between the lower federal courts on this question.

While not reaching Appellee's contentions that the Missouri statutes also violated the equal protection clause of the Fourteenth Amendment and the cruel and unusual punishment provision of the Eighth Amendment, the Court of Appeals noted possible merit to these arguments. In these respects, Appellant believes the opinion to be erroneous.

Appellee's equal protection claim was based upon the distinction under the Missouri statutes with respect to felonies and misdemeanors. Appellee urged that there

was no rational basis for distinguishing between nonviolent felonies and misdemeanors. The Court of Appeals below stated in note 32 the wildest argument was not without merit, the real objection was that nonviolent suspects are shot at all. Again, this is based upon the misconception that violence or threatened violence by a fleeing suspect is the only permissible rationale for use of potentially deadly force. As noted above, there are other state interests involved and when these are coupled with the general legislative determination that felonies are more serious offenses than misdemeanors, Appellant does not believe it can be said that the classification lacks a rational basis. Equal protection attacks upon similar statutes have also been rejected. *Jones* v. *Marshall, supra; Cunningham* v. *Ellington, supra.*

Appellee also argued that the Missouri statutes inflicted cruel and unusual punishment in violation of the Eighth Amendment to the Constitution. While again noting probable merit to this contention, the majority did recognize that courts have held that an officer's use of force does not constitute punishment within the meaning of the Eighth Amendment. *Cunningham* v. *Ellington, supra; Wiley* v. *Memphis Police Department*, Civil No. C-73-8 (W.D.Tenn., filed June 30, 1975, as amended July 27, 1975), appeal docketed No. 75-2321 (6th Cir., November 13, 1975). This position was likewise adopted by the District Court below and Appellant submits that it is correct. The application of force by state officers is not necessarily pursuant to a punishment rationale. In the situation of a fleeing felon, the most obvious rationale is his apprehension. This, however, fails to involve the Eighth Amendment.

Finally, Appellant submits that the opinion of the Court of Appeals is an unjustifiable encroachment upon legislative functions. The dissent below expressed the

opinion that the issue presented is one involving questions of public policy. Such matters, however, are entrusted to the legislature rather than the judiciary. The Appellee has throughout this case relied upon the proposal of the model penal code with regard to use of potentially deadly force by police officers. This, however, clearly indicates that it is a matter aimed at legislative rather than judicial revision. As the dissent below noted, this is buttressed by the history of the American Law Institute's formulation of the restatement of torts. The American Law Institute in the first restatement of torts presented a modification of the common law principle permitting the use of potentially deadly force to effect the arrest of a felon. Restatement (first) of Torts (§131 (1934)). The modification of the common law was abandoned in 1948, and the common law rule was reinstated. In the 1966 appendix to the second restatement of torts, this abandonment is explained as a result of lack of support. No case could be found in accord with the ALI's modification. However, the ALI continues to urge the modification of the common law rule through the model penal code. Several states have chosen to legislatively revise the common law rule by adoption of the model penal code. However, courts have consistently refrained from judicially revising the common law rule and have held that these are matters to be passed upon by the legislature. *Jones* v. *Marshall, supra; Cunningham* v. *Ellington, supra; Hilton* v. *State*, 348 A.2d 242 (Me. 1975); *Schumann* v. *McGinn*, 240 N.W.2d 525 (Minn. 1976). Therefore, Appellant submits that the opinion of the Court of Appeals is erroneous in a most fundamental sense: that the issue presented was simply not one appropriate for judicial resolution.

Appellant contends that the opinion of the Court of Appeals is erroneous in holding that §§544.190 and 559.040 infringe upon the right to life secured by the Fourteenth

Amendment to the United States Constitution, in failing to recognize the valid state interests encompassed by these statutes, in failing to consider the procedural safeguards which govern the application of these statutes and which are designed to prevent the arbitrary and unnecessary use of force by police officers, and in deciding a question which was more appropriate for legislative rather than judicial determination. Appellant believes that the questions presented by this appeal are substantial and that they are of great public significance.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 75-1849

Robert Dean Mattis, M.D.,
Appellant,
v.
Richard R. Schnarr and Robert Marek,
Appellees,
v.
John C. Danforth, Attorney General, State of Missouri,
Intervenor-Appellee.

Appeal From the United States District Court for the Eastern District of Missouri.

Submitted: August 17, 1976
Filed: December 1, 1976

Before GIBSON, Chief Judge, LAY, HEANEY, BRIGHT, ROSS, STEPHENSON and HENLEY, Circuit Judges, en banc.*

HEANEY, Circuit Judge, with whom LAY, BRIGHT and ROSS, Circuit Judges, concur.

*Judge Webster did not participate in the above opinion.

This appeal concerns the constitutionality of Missouri statutes[1] which permit law enforcement officers to use deadly force to effect the arrest of a person who has committed a felony if the person has been notified that he or she is under arrest and if the force used is restricted to that reasonably necessary to effect the arrest.[2] We hold the statutes unconstitutional as applied to arrests in which an officer uses deadly force against a fleeing felon who has not used deadly force in the commission of the felony

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1. *Justifiable Homicide*

Homicide shall be deemed justifiable when committed by any person in either of the following cases:

* * *

(3) When necessarily committed in attempting by lawful ways and means to apprehend any person for any felony committed, or in lawfully * * * keeping or preserving the peace.

V.A.M.S. §559.040.

Rights of officer in making arrests

If, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all necessary means to effect the arrest.

V.A.M.S. §544.190.

2. "Deadly force" is not defined in either of the challenged statutes. We use the term in this opinion as it is used in the MODEL PENAL CODE §3.11(2) (1962):

> "deadly force" means force which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily harm. Purposely firing a firearm in the direction of another person or at a vehicle in which another person is believed to be constitutes deadly force.

See also Comment, *Deadly Force to Arrest: Triggering Constitutional Review*, 11 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 361, 363 (1976) [hereinafter cited as Comment, 11 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 361]:

> [D]eadly force is such force as under normal circumstances poses a high risk of death or serious injury to its human target, regardless of whether or not death, serious injury or any harm actually results in a given case.

and whom the officer does not reasonably believe will use deadly force against the officer or others if not immediately apprehended.

The challenge to the constitutionality of the Missouri statutes arose out of the killing of Michael Mattis by Robert Marek, a police officer.

Michael Mattis, age eighteen, and Thomas Rolf, age seventeen, were discovered in the office of a golf driving range at approximately 1:20 A.M. by police officer, Richard Schnaar. Shortly thereafter, the two boys left the office by climbing out through the back window. Schnaar shouted at the boys to halt. They ran in different directions. Schnarr then shouted, "Halt or I'll shoot" two times. When the boys failed to stop, he fired one shot into the air and one shot at Rolf. Meanwhile, Officer Robert Marek, who had arrived on the scene, ran to intercept the boys. He collided with Mattis as he came around the corner of the building. Both fell to the pavement. Marek grabbed Mattis by the leg. Mattis broke away. Marek ran after him. Marek was losing ground. He shouted, "Stop or I'll shoot." Mattis did not stop. Marek, believing it was necessary to take further action to prevent Mattis's escape, fired one shot in the direction of Mattis and killed him. Both officers believed that the use of their guns was reasonably necessary to effect an arrest and was authorized by valid Missouri statutes.

Robert Dean Mattis, the father of Michael, brought an action against the officers and the City of Olivette under 42 U.S.C. §§1983 and 1988, V.A.M.S. §537.080, 28 U.S.C. §§1343(4), 2201 and 2202, and the Constitution of the United States, Amendments XIV, VIII and IX. It is alleged in the complaint that the officers, acting under color of law, deprived Michael Mattis of his

life without due process of law, deprived him of the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution, and inflicted a cruel and unusual punishment on him in violation of the Fourteenth, Eighth and Ninth Amendments of the Constitution. The court was asked to declare V.A.M.S. §§559.040 and 544.190 unconstitutional and to award damages of $100.00.

The officers asserted in their answer that the statutes had been construed by the Missouri courts to authorize police officers to use deadly force to prevent the escape of a person fleeing from a lawful arrest after committing a felony. They further asserted that any acts performed by them were done in good faith and in reliance on the laws of Missouri which they had probable cause to believe were constitutional.[3] The trial court dismissed the case holding that Robert Mattis did not have standing to bring the action and that defenses of good faith and probbable cause were available to the officers. *Mattis v. Kissling, et al.*, Civil No. 72-Civ.(3) (E.D. Mo., filed January 16, 1973).

Robert Mattis appealed to this Court. We held that he had standing, that the defenses of good faith and probable cause were available to the officers insofar as the action for damages was concerned, but were unavailable insofar as declaratory relief was concerned. We remanded the matter with directions to the trial court to determine the constitutionality of the statutes in question. We directed that the Attorney General of the State of Missouri be given an opportunity to intervene pursuant to Fed.R. App.P. 24. *Mattis v. Schnarr*, 502 F.2d 588 (8th Cir. 1974).

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3. The local police department had issued no instructions to its officers on the circumstances under which they could use their firearms.

After remand, Robert Mattis filed a second amended complaint. It substantially tracked the earlier complaints.[4] The State of Missouri filed an answer admitting that Michael Mattis was shot and killed by Officer Marek while Mattis was attempting to escape from an arrest sought to be made on suspicion of burglary, a felony under Missouri law. The answer also asserted that V.A.M.S. §§559.040 and 544.190, as construed by the Supreme Court of Missouri to authorize the use of deadly force by police officers if reasonably necessary to prevent a felon but not a misdemeanant[5] from escaping, are constitutional.

The District Court entered a judgment upholding the constitutionality of the statutes. In discussing the due process claim, it stated:

> Constitutional rights are not absolute; where conflict arises between assertions of rights, there must be a balancing of the public interest and the individual's rights. * * *
>
> Here the claims of parental rights must be weighed against the interest of the state in apprehending criminals and in aiding police officers in the fulfillment of this duty. The dangers faced by the police are not to be minimized. * * * To restrict the means available to the police to effectuate an arrest is to reduce the effectiveness of the officers in the pursuit of their duties. * * *
>
> * * *

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4. The claim for damages was dropped and other minor changes were made. An allegation that the statutes were void for vagueness was added.

5. The state cites *Manson v. Wabash Railroad Co.*, 338 S.W.2d 54 (Mo. 1960); *State v. Browers*, 356 Mo. 1195, 205 S.W.2d 721 (1947) and *State v. Ford*, 344 Mo. 1219, 130 S.W.2d 635 (1939), in support of its position. We agree that the statutes have been so construed.

> The competing interests here involve two different areas of concern; plaintiff asserts a right to raise a family and to have his parental rights continue until terminated by due process of law while the state asserts an interest in aiding police officers in apprehending criminal suspects. While neither assertion of right is to be taken lightly, it is this Court's opinion that plaintiff's claims of parental rights must yield to the state's overriding interest as determined by the legislature.

Mattis v. Schnarr, 404 F.Supp. 643, 646-647 (E.D. Mo. 1975).

With respect to the equal protection claim, it stated that the statutory classification was reasonable and as free from arbitrariness as any other suggested classification.

The court, in discussing the cruel and unusual punishment claim, stated that the issue was whether the use of deadly force against fleeing felons by police officers "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). It pointed out that thirty-four states authorized the use of the force sought to be condemned here and declared that this fact gave credence to the proposition that the limits of civilized standards had not been exceeded.

The court concluded by noting:

> To abolish the use of deadly force altogether is to deprive the state and its citizens of their rights to security, safety and a feeling of protection. To pick and choose those crimes warranting the application of these statutes is the duty of the legislature. It involves a determination of the effect and seriousness of crimes on society and such a determination lies exclusively within the province of the legislative branch. It is not the role of a federal judge to legislate for the people of a state.

The court dismissed the action. *See Mattis v. Schnarr*, *supra* at 651.

This appeal followed.

We emphasize initially that no claim is made that the statutes are unconstitutional insofar as they permit police officers to use deadly force where reasonably necessary to effect the arrest of a fleeing felon who has used or has threatened to use deadly force in the commission of the felony for which he or she is being apprehended or insofar as they permit such force to be used to apprehend a fleeing felon whom the officers reasonably believe will use deadly force against the arresting officers or others if he or she is not immediately apprehended. The claim is the narrower one that the statutes are unconstitutional as applied to fleeing felons suspected of a nonviolent felony whom the officers do not reasonably believe will use deadly force against the officers or others.[6]

We also emphasize that we are not concerned in this case with whether the force used was that reasonably necessary to effect the immediate arrest of the fleeing Michael Mattis. It was necessary if Michael was to be apprehended at that time. The question is, rather, whether deadly force could constitutionally be used to effect the arrest of this fleeing eighteen-year-old burglar who threat-

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6. This classification of crime follows that used in U. S. FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES—UNIFORM CRIME REPORTS—1973, 1 (1973), which classifies crime into violent (homicide, forcible rape, robbery, and aggravated assault), property (including auto theft, theft, burglary, and other forms of breaking and entering), and other offenses. Other crimes—embezzlement, forgery, or narcotics violations—can be used as examples in arguing that allowing deadly force against all felons is irrational, but it is extremely unlikely for deadly force to be used in the arrest of such criminals.

Comment, 11 HARV. CIV. RIGHTS-CIV. LIB. L. REV., *supra* at 364 n.10.

ened no one's life during the commission of the burglary and posed no threat to the apprehending officers or others.

With the issue thus defined, we turn to a brief discussion of common and statutory law, scholarly opinion and present police practice with respect to the use of deadly force.

At common law, deadly force could be used by a law enforcement officer if necessary to effect the arrest of a felony suspect but not of a suspected misdemeanant.[7]

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7. This rule reflected the social and legal context of felonies in 15th century England and 18th century America. Since all felonies—murder, rape, manslaughter, robbery, sodomy, mayhem, burglary, arson, prison break and larceny—were punished by death, the use of deadly force was seen as merely accelerating the penal process, albeit without providing a trial. "It made little difference if the suspected felon were killed in the process of capture, since, in the eyes of the law, he had already forfeited his life by committing the felony." It was also assumed that a suspected felon facing death upon capture was more desperate than a misdemeanant and that greater force was required for his apprehension. Finally, because there was no network of police forces a felon eluding his initial pursuers would probably escape ultimate arrest.

Comment, 11 HARV. CIV. RIGHTS-CIV. LIB. L. REV., *supra* at 365 (footnotes omitted).

See also 4 W. Blacktone, Commentaries *180; Greenstone, *Liability of Police Officers for Misuse of Their Weapons*, 16 CLEV.-MAR. L. REV. 397 (1967); Note, *Justification: The Impact of the Model Penal Code on Statutory Reform*, 75 COLUM. L. REV. 914 (1975); Comment, *The Use of Deadly Force in the Protection of Property Under the Model Penal Code*, 59 COLUM. L. REV. 1212, 1218 n.35 (1959); Tsimbinos, *The Justified Use of Deadly Force*, 4 CRIM. L. BULL. 3 (1968); McDonald, *Use of Force by Police to Effect Lawful Arrest*, 9 CRIM. L. Q. 27 (1967); *Perkins, *The Law of Arrest*, 25 IOWA L. REV. 201 (1940); Comment, *The Use of Deadly Force in Arizona by Police Officers*, 1973 L. & SOC. ORDER 481, 482 (1973); Pearson, *The Right to Kill in Making Arrest*, 28 MICH. L. REV. 957 (1930); Wilgus, *Arrest Without a Warrant*, 22 MICH L. REV. 541, 569 (1924); Moreland, *The Use of Force in Effecting or Resisting Arrest*, 33 NEB. L. REV. 408 (1954); Note, *Criminal Law—Use of Deadly Force in Preventing Escape of Fleeing Minor Felon*, 34 N. C. L. REV. 122 (1955); Note, *Justification for the Use of Force in the Criminal*

(Footnote continued on following page)

While the rule has been severely criticized by legal scholars, most jurisdictions governed by common law have continued to adhere to the distinction.[8] As early as 1887, however, Judge Brown, of the Eastern District of Michigan, later appointed to the Supreme Court of the United States, stated:

> I doubt, however, whether this law would be strictly applicable at the present day. Suppose, for example, a person were arrested for petty larceny, which is a felony at the common law, might an officer under any circumstances be justified in killing him? I think not. The punishment is disproportionate to the magnitude of the offense.

United States v. Clark, 31 Fed. 710, 713 (Cir. Ct., E.D. Mich. 1887).

At least twenty-four states, including five in this Circuit—Arkansas, Iowa, Minnesota, Missouri, South Dakota—codify the common law and provide that deadly force may be used to arrest any felony suspect.[9] Seven

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(Continued from previous page)

Law, 13 STAN. L. REV. 566 (1961); Bohlen & Shulman, *Arrest With and Without a Warrant*, 75 U. PA. L. REV. 485, 495 (1927); Note, *Legalized Murder of a Fleeing Felon*, 15 VA. L. REV. 582 (1929); Note, *Justifiable Use of Deadly Force by the Police: A Statutory Survey*, 12 WM. & MARY L. REV. 67 (1970).

8. *See* Comment, 11 HARV. CIV. RIGHTS-CIV. LIB. L. REV., *supra* at 367-368 n.28.

9. The twenty-four states, according to Comment, 11 HARV. CIV. RIGHTS-CIV. LIB. L. REV., *supra* at 368 n.30, are:

> ALASKA STAT. §11.15.090 (1970); ARIZ. REV. STAT. ANN. §13-461 (Supp. 1972); ARK. STAT. ANN. §41-510(2)(a) (Spec. Pamphlet 1976); CAL. PENAL CODE §196 (West 1970); COLO. REV. STAT. ANN. §18-1-707(2)(b)(1973); CONN. GEN. STAT. §53a-22(c)(2)(1975); FLA. STAT. ANN. §776-05 (Supp. 1975); IDAHO CODE §19-610 (1970); IND. CODE §35-1-19-3 (Burns 1975); IOWA CODE §755.8 (1971); KAN. STAT. ANN. §21-3215(1)(1974); MINN. STAT.

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states depart from the common law by specifying the felonies for which deadly force may be used to arrest or by stating that only "forcible felonies" justify the use of deadly force.[10] North Dakota permits a law enforcement officer to use deadly force if that force is necessary to effect an arrest of a person who has committed or attempted to commit a felony "involving violence, or is attempting to escape by the use of a deadly weapon, or has otherwise indicated that he is likely to endanger human life or to inflict serious bodily injury unless apprehended without delay." N. D. Cen. Code §12.1-05-07(d)(1975). Another seven states,[11] including Nebraska of this Circuit, have

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§609.065(3) (1974); MISS. CODE ANN. §97-3-15 (1972); MO. REV. STAT. §559.040 (Vernon 1969); MONT. REV. CODE. ANN. §94-2512 (Spec. Supp. 1973); NEV. REV. STAT. §200.140(3)(b)(1973); N.H. REV. STAT. ANN. §627:5(II)(b)(1)(Supp. 1973); N.M. STAT. ANN. §40A-2-7 (1963); OKLA. STAT. ANN. tit. 21, §732 (1951); R.I. GEN. LAWS §12-7-9 (1969); S.D. COMP. LAWS ANN. §22-16-32 (1967); TENN. CODE ANN. §40-808 (1956); WASH. REV. CODE ANN. §9.48.160 (1961), §9A. 16.040(3)(1975) (effective July 1, 1976); WIS. STAT. §939.45(4)(1973).

10. According to the same source, these states are:

GA. CODE ANN. §26-902 (1972); ILL. REV. STAT. ch. 38, §7-5(A)(2)(1973); N.Y. PENAL LAW §35.30(1)(a)(ii) (McKinney Supp. 1971); N.D. CENT. CODE & 12.1-05-07(2)(d)(1975); ORE. REV. STAT. §161.239 (1973); PA. STAT. ANN. tit. 18, §508(A)(1)(ii)(1973); UTAH CODE ANN. §76-2-404(2)(b)(Supp. 1975).

Id. at n.31.

11. According to the same source, these states are:

DEL. CODE ANN. tit. 11 §467(c)(1974); HAWAII LAWS, Act 9, ch. 3 (1972)(effective 1973) §307(3); KY. REV. STAT. §503.90(2)(1975); MAINE REV. STAT. ANN. tit. 17A §107-2(B)(1975)(effective March 1, 1976); NEB. REV. STAT. §28-839(3)(Supp. 1974); TEX. PENAL CODE art. 2, §9.51(c)(1974). North Carolina allows the use of deadly force to arrest one fleeing from a felony with a deadly weapon in addition to those situations in which the Model Penal Code formulation authorizes deadly force. N.C. GEN. STAT. §15a-401(d)(2)(b)(1973).

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adopted the Model Penal Code approach, which permits the use of deadly force only when the crime for which the arrest is made involves conduct including use or threatened use of deadly force or when there is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed.[12]

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New York adopted the Model Penal Code approach in 1965 but returned to the forcible felony rule in 1967. *See* Leibovitz, [*Justifiable Use of Force Under Article 35 of the Penal Law of New York*, 18 BUFFALO L. REV. 285, 290-295 (1969)]. Idaho adopted the Model Penal Code in 1971 but repealed it three months after its effective date in 1972. *See* [Note, *Justification; the Impact of the Model Penal Code on Statutory Reform*, 75 COLUM. L. REV. 914] at 915 n.4; Stone & Hall, *The Model Penal Code in Idaho?*, 8 IDAHO L. REV. 221 (1972).

Id. at 369 nn.32 & 33. *See also* 4 CRIM. L. BULL., *supra* note 7, at 11.

12. §3.07. *Use of Force in Law Enforcement*

(1) *Use of Force Justifiable to Effect an Arrest.* Subject to the provisions of this Section and of Section 3.09, the use of force upon or toward the person of another is justifiable when the actor is making or assisting in making an arrest and the actor believes that such force is immediately necessary to effect a lawful arrest.

(2) *Limitations on the Use of Force.*

(a) The use of force is not justifiable under this Section unless:

(i) the actor makes known the purpose of the arrest or believes that it is otherwise known by or cannot reasonably be made known to the person to be arrested; and

(ii) when the arrest is made under a warrant, the warrant is valid or believed by the actor to be valid.

(b) The use of deadly force is not justifiable under this Section unless:

(i) the arrest is for a felony; and

(ii) the person effecting the arrest is authorized to act as a peace officer or is assisting a person whom he believes to be authorized to act as a peace officer; and

(iii) the actor believes that the force employed creates no substantial risk of injury to innocent persons; and

(Footnote continued on following page)

The President's Commission on Law Enforcement and Administration of Justice, the National Commission on Reform of Federal Criminal Laws,[13] and legal scholars[14]

(Continued from previous page)

(iv) the actor believes that:

(1) the crime for which the arrest is made involved conduct including the use of threatened use of deadly force; or

(2) there is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed.

(3) *Use of Force to Prevent Escape from Custody.* The use of force to prevent the escape of an arrested person from custody is justifiable when the force could justifiably have been employed to effect the arrest under which the person is in custody, except that a guard or other person authorized to act as a peace officer is justified in using any force, including deadly force, which he believes to be immediately necessary to prevent the escape of a person from a jail, prison, or other institution for the detention of persons charged with or convicted of a crime.

MODEL PENAL CODE §3.07 (1962).

13. §607. *Limits on the Use of Force: Excessive Force; Deadly Force.*

* * *

(2) Deadly Force. Deadly force is justified only in the following instances:

* * *

(d) when used by a public servant authorized to effect arrests or prevent escapes, if such force is necessary to effect an arrest or to prevent the escape from custody of a person who has committed or attempted to commit a Class A or B felony involving violence, or is attempting to escape by the use of a deadly weapon, or has otherwise indicated that he is likely to endanger human life or to inflict serious bodily injury unless apprehended without delay[.]

The National Commission on Reform of Federal Criminal Laws, Study Draft of a New Federal Criminal Code (Title 18, U.S.C.) (1970).

The recommendations of the Commission have been incorporated into the Criminal Justice Reform Act of 1975 authored by Senators McClellan, Hruska, Bayh, Eastland, Fong, Griffin, Mansfield, Moss, Hugh Scott, Taft and Tower. 121 Cong. Rec. 29 (early ed. Jan. 15, 1975). This bill is intended to be a recodification of the federal criminal laws. The quoted section does not appear to have been a controversial one. Hearings on Reform of the Federal Criminal Laws Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 92nd Cong., 2nd Sess. at 3493 (1972).

14. *See* note 7, *supra* at 10-11.

whose writings span the last five decades generally support a rule which would limit the use of deadly force by police officers to those circumstances where the use of force is essential to the protection of human life and bodily security, or where violence was used in committing the felony.

The reasons advanced by the President's Commission are particularly important. The Commission found, through its studies, that

> [p]olice use of firearms to apprehend suspects often strains community relations or even results in serious disturbances. * * *
>
> When studied objectively and unemotionally, particular uses of firearms by police officers are often unwarranted. * * *
>
> * * *
>
> It is surprising and alarming that few police departments provide their officers with careful instruction on the circumstances under which the use of a firearm is permissible. * * *
>
> It is essential that all departments formulate written firearms policies which clearly limit their use to situations of strong and compelling need. * * *
>
> 1. Deadly force should be restricted to the apprehension of perpetrators who, in the course of their crime threatened the use of deadly force, or if the officer believes there is a substantial risk that the person whose arrest is sought will cause death or serious bodily harm if this apprehension is delayed. The use of firearms should be flatly prohibited in the apprehension of misdemeanants, since the value of human life far outweighs the gravity of a misdemeanor.
>
> * * *

5. Officers should be allowed to use any necessary force, including deadly force, to protect themselves or other persons from death or serious injury. In such cases, it is immaterial whether the attacker has committed a serious felony, a misdemeanor, or any crime at all.

The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police, 189-190 (1967) (footnote omitted).

More recent studies indicate that an important factor in increasing community tensions is that there is often a disproportionate use of deadly force against non-white suspects.[15]

Professor Michael Mikell has challenged the legal basis for permitting deadly force to be used against fleeing nonviolent felons since neither their original offense or their flight is ever punishable by death. His statement at the American Law Institute Proceeding in 1931 puts the matter aptly:

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15. The Metropolitan Applied Research Center, Inc., conducted a study, in 1974, which showed that of 248 persons killed by the New York City Police from 1970 through 1973, seventy-three percent were black or Puerto Rican and under thirty years of age.

A similar study conducted by the Chicago Police Department, entitled *The Police and Their Use of Fatal Force*, concluded:

> Blacks were more than six times as likely to die at the hands of police as were whites during the period surveyed.
> [I]ndividuals under 25 remained twice as likely to die at the hands of the police as those over 25.

Id. at 27.

From 1950 through 1960, the death rate for blacks at the hands of police was nine times higher than that for whites in Akron, Chicago, Kansas City, Miami, Buffalo, Philadelphia, Boston and Milwaukee. Robin, *Justifiable Homicide By Police Officers*, 54 *J. of Crim. L., Criminology and Police Science* 225, 229 (1963). In any given year, an Akron police officer was forty-five times more likely to kill a fleeing felon than a Boston police officer. *Id.*

It has been said, "Why should not this man be shot down, the man who is running away with an automobile? Why not kill him if you cannot arrest him?" We answer: because, assuming that the man is making no resistance to the officer, he does not deserve death * * * May I ask what we are killing him for when he steals an automobile and runs off with it? Are we killing him for stealing the automobile? If we catch him and try him, we throw every protection around him. We say he cannot be tried until 12 men of the grand jury indict him, and then he cannot be convicted until 12 men of the petit jury have proved him guilty beyond a reasonable doubt, and then when we have done all that, what do we do to him? Put him before a policeman and have a policeman shoot him? Of course not. We give him three years in a penitentiary. It cannot be then that we allow the officer to kill him because he stole the automobile, because the statute provides only three years in a penitentiary for that. Is it then for fleeing? And again, I insist this [is] not a question of resistance to the officer. Is it for fleeing that we kill him? Fleeing from arrest is also a common law offense and is punishable by a light penalty, a penalty much less than that for stealing the automobile. If we are not killing him for stealing the automobile and are not killing him for fleeing, what are we killing him for?[16]

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16. Under Missouri law, the maximum penalty that Michael Mattis could have received had he been found guilty of committing second degree burglary would have been ten years imprisonment in the state penitentiary. V.A.M.S. §560.095(2). There appears to be no Missouri statute that specifically applies to simple flight from arrest. V.A.M.S. §§557.200 and 557.210, which deal with resisting arrest, have not been construed to include simple flight from arrest. The most nearly applicable statute is V.A.M.S. §557.390, which proscribes escape from the custody of an officer once it has been established. It is punishable by not more than two years in the state penitentiary.

9 ALI PROCEEDINGS 186-187 (1931).

And Judge Learned Hand, who participated in the efforts of the American Law Institute to develop a policy with respect to the use of deadly force, stated:

> Mr. President, may I say a word? It has been constantly supposed here that if you are able to shoot a robber you are less likely to have a robber. I question that. I challenge it altogether. I don't believe that possibility figures at all in the commission of crime.
>
> If not, then I submit it is merely a question as to whether, in order to save your own property, you may kill another man. And people will differ about that. I feel very strongly that you ought not to have that privilege and to do so would be to go back a step toward, at least, an era of violence.[17]

35 ALI PROCEEDINGS 298 (1958)

The Federal Bureau of Investigation by Memorandum 31-72, dated November 21, 1972, adopted the following policy with respect to the use of firearms:

> It is the policy of the Bureau that an Agent is not to shoot any person except, when necessary, in self-defense, that is, when he reasonably believes that he or another is in danger of death or grievous bodily harm.
>
> Self-defense was defined by Mr. Justice Holmes, in language with which the courts still agree, as follows:

17. While Judge Learned Hand's word were specifically directed towards the right of a private citizen to defend his own property, it is clear from reading the entire transcript that he was speaking to the larger problem of justification to use deadly force. 35 ALI PROCEEDINGS 258-334 (1958).

> "Many respectable writers agree that if a man reasonably believes that he is in immediate danger of death or grievous bodily harm from his assailant, he may stand his ground, and that if he kills him, he has not exceeded the bounds of lawful self-defense. That has been the decision of this court." *Brown v. U. S.*, 256 U.S. 5 (1921).
>
> The term "self-defense" also includes the right to defend another person against what is reasonably perceived as an immediate danger of death or grievous bodily harm to that person from his assailant. 40 *American Jurisprudence* 2d, 170-171.
>
> I want to reiterate that emphasis must be placed on planning arrests so that maximum pressure is placed on the individual being sought, and he has no opportunity either to resist or flee. Any situation of this type can deteriorate in an instant, and continuing alertness, extreme care, and good judgment are necessary to enable our Agents to control the situation. If a subject initiates action which may cause physical harm, there should be no hesitancy in using such force as is necessary to bring the subject under control effectively and expeditiously.[18]

18. The Bureau of Narcotics and Dangerous Drugs has adopted similar regulations:

> An agent will not shoot at any person except to protect his own life or that of some other person.
>
> Agents will not fire at fleeing suspects or fleeing defendants, agents will not fire at a fleeing automobile being used simply as a means of escape.
>
> The firing of warning shots is prohibited. Agents will not remain passive in a threatening situation. However, the agent will ensure that he has made an accurate assessment of the situation in considering the use of firearms.
>
> Firearms will not be utilized to coerce or intimidate suspects or defendants who are not threatening an agent or another person.

Internal Regulations, Bureau of Narcotics and Dangerous Drugs, December, 1971.

A number of local law enforcement agencies have adopted policies similar to those recommended by the Model Penal Code.[19]

The foregoing review clearly establishes that the historical basis for permitting the use of deadly force by law enforcement officers against nonviolent fleeing felons has been substantially eroded,[20] that federal and many state

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19. The Planning and Research Division of the Boston Police Department released a study on May 3, 1974, in which it was reported that a majority of the large cities permit officers to fire their weapons only if the perpetrator has, in the process of committing an offense, presented a threat of serious injury or death to someone. In some of these cities, deadly force may be used against individuals who are suspected of committing only certain specified crimes. Washington, D.C., San Francisco, Dallas, Philadelphia, Oakland, Atlanta, New Orleans, Honolulu and Phoenix permit such force to be used only in cases of homicide, robbery, rape, arson and kidnapping. Chicago, Seattle, Memphis and Buffalo authorize the use of deadly force in cases of burglary, breaking and entering and various assaults with intent. *See* Boston Police Department, Planning & Research Division, *The Use of Deadly Force by Boston Police Personnel*, May 3, 1974. The St. Louis, Missouri, Police Department Rule 46, on the other hand, permits firearms to be discharged when reasonably necessary to effect the capture of a person whom the officer has probable cause to believe has committed a felony.

The Minnesota Highway Patrol and the sheriff's departments of Hennepin and Ramsey Counties, the two largest counties in the state of Minnesota, have adopted rules that closely follow the Model Penal Code, *See Schumann v. McGinn*, ... Minn. ....., 240 N.W.2d 525 (1976). The Los Angeles Police Department and the District of Columbia Metropolitan Police Department have adopted similar rules.

A study published in the Journal of Police Science and Administration, entitled *An Approach to the Problem of Excessive Force by Police*, concludes that the excessive use of force can be diminished by improved selection, supervision and training of police officers. *Id.* at Vol. 3, No. 4, p. 380 (1975).

20. Even if this were not the case, no one acquires a vested or protected right in violation of the Constitution by long use, even when the span of time covers our entire national existence and indeed predates it.

Walz v. Tax Commission, 397 U.S. 664, 678 (1970). *See also Almeida-Sanchez v. United States*, 413 U.S. 266 (1973); *Roe v. Wade*, 410 U.S. 113 (1973); *Furman v. Georgia*, 408 U.S. 238 (1972); *Reynolds v. Sims*, 377 U.S. 533 (1964).

and local law enforcement agencies prohibit the use of deadly force against such felons except where human life is threatened, and that the policy of permitting deadly force to be used against all fleeing felons contributes little or nothing to public safety or the deterrence of crime. Instead, the use of deadly force often tends to increase hostility towards law enforcement and to exacerbate community tensions. In short, there is little or no informed contemporary support for statutes as broad as these are. Moreover, no evidence was introduced below, either by the defendants or the intervening State of Missouri, indicating that a societal purpose is served by statutes as broad as these two.

However, it is not for this Court to decide whether the Missouri statutes are wise or not. The sole question before this Court is whether the statutes are unconstitutional. We hold they are.[21]

We are concerned with the right of an individual to life,[22] expressly recognized in the due process clauses of

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21. We are aware other courts have reached a contrary conclusion. In *Cunningham v. Ellington*, 323 F.Supp. 1072 (W.D. Tenn. 1971), a three-judge court sitting in the Western District of Tennessee held that a Tennessee statute similar to the Missouri one was not violative of the Eighth Amendment, was not unconstitutional, overbroad or vague and was not violative of the equal protection clause of the Fourteenth Amendment. A similar result was reached in *Wiley v. Memphis Police Dep't*, Civil No. C-73-8 (W.D. Tenn., filed June 30, 1975, as amended, July 27, 1975), *appeal docketed*, No. 75-2321 (6th Cir., Nov. 13, 1975). *See also Jones v. Marshall*, 528 F.2d 132 (2nd Cir. 1975); *Beech v. Melancon*, 465 F.2d 425 (6th Cir. 1972), *cert. denied*, 409 U.S. 1114 (1973).

In *Wolfer v. Thaler*, 525 F.2d 977 (5th Cir.), *cert. denied*, 96 S.Ct. 2176 (1976), the Court affirmed a dismissal of a §1983 action brought against a police officer on the grounds that the victim's father and mother did not have standing to bring the action and that the Texas law had been amended after the shooting incident occurred.

22. The appellant is asserting the right to parenthood, which this Court has held to be fundamental. *Mattis v. Schnarr*, 502 F.2d

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the Fifth and Fourteenth Amendments to the United States Constitution, which respectively ordain:

> No person * * * shall be deprived of life, liberty, or property, without due process of law [.]

U. S. Const. Amend. V; and

> nor shall any State deprive any person of life, liberty, or property, without due process of law[.]

U. S. Const. Amend. XIV.

Clearly, the right to life is "fundamental,"[23] and has often been so recognized in the equal protection and due process contexts.

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588, 595 (8th Cir. 1974). That right encompasses the right of the appellant to raise the issue of his son's right to life and to challenge the constitutionality of the statutes which permit the use of deadly force.

The court below and the court in *Cunningham v. Ellington, supra,* found that the right to life was not involved and that what was at issue was a right to flee. We disagree. It is conceded that Michael Mattis did not have a right to burglarize the office of the golf driving range and that he did not have a right to flee. The question remains, however, can his life be taken without due process if he decides to do so?

23. Among the rights that have been declared fundamental in equal protection analysis are the right to travel, *Memorial Hospital v. Maricopa County,* 415 U.S. 250 (1974); *Shapiro v. Thompson,* 394 U.S. 618 (1972); equal access to voting, *Dunn v. Blumstein,* 405 U.S. 330 (1972); and procreation, *Skinner v. Oklahoma,* 316 U.S. 535 (1942). *See generally San Antonio Independent School Dist. v. Rodriguez,* 411 U.S. 1, 30-36 nn.74-76 (1973); Note, *Fundamental Personal Rights: Another Approach to Equal Protection,* 40 U. CHI. L. REV. 807 (1973).

Among the rights that have been declared fundamental in due process analysis are the right to abort a pregnancy (encompassed within the right to privacy), *Roe v. Wade, supra;* to be free of restrictive maternity leave regulations that burden "the freedom of personal choice in matters of marriage and family life," *Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 639-640 (1974); and the "rights to conceive and raise one's children," *Stanley v. Illinois,* 405 U.S. 645, 651 (1972).

As early as 1886, the Supreme Court in *Yick Wo v. Hopkins,* 118 U.S. 356, 370 (1886), spoke of the fundamental rights "to life, liberty and the pursuit of happiness." Again, in *Johnson v. Zerbst,* 304 U.S. 458, 462 (1938), the Court spoke of "the fundamental human rights of life and liberty." In *Screws v. United States,* 325 U.S. 91, 123 (1945), Mr. Justice Rutledge, concurring, stated:

> The Fifth Amendment contains a due process clause as broad in its terms restricting national power as the Fourteenth is of state power. * * * If it [the predecessor of §242, the criminal counterpart of §1983] is valid to assure the rights "plainly and directly" secured by other provisions, it is equally valid to protect those "plainly and directly" secured by the Fourteenth Amendment, including the expressly guaranteed rights not to be deprived of life, liberty or property without due process of law.

Id. at 123 (footnote omitted).

The dissenting views of Mr. Justice Murphy, in the same opinion, also recognized the existence of a right to life:

> He has been deprived of the right to life itself. * * * That right was his because he was an American citizen, because he was a human being. As such, he was entitled to all the respect and fair treatment that befits the dignity of man, a dignity that is recognized and guaranteed by the Constitution.

Id. at 134-135.

More recently, the preeminence of life in the system of constitutional values was recognized in *Roe v. Wade,* 410 U.S. 113 (1973), where the Court held that the Fourteenth Amendment protection of "person" constitutes a "right to life." *Id.* at 157. It reasoned that once the point of

viability is reached, the fetus's right to life is guaranteed specifically by the Fourteenth Amendment.

Even though the right to life is fundamental, the recent Supreme Court death penalty cases[24] establish that when an offender has feloniously taken the life of another, capital punishment is not invariably disproportionate to the crime. It may be imposed without violating his Eighth or Fourteenth Amendment rights under "a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance." *Gregg v. Georgia*, 96 S.Ct. 2909, 2935 (1976). Such punishment, of course, can only take place after the offender has been accorded due process. Due process, in the criminal context, means a trial[25] and its attendant procedural safeguards.[26]

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24. *Roberts v. Louisiana*, 96 S.Ct. 3001 (1976); *Woodson v. North Carolina*, 96 S.Ct. 2978 (1976); *Proffitt v. Florida*, 96 S.Ct. 2960 (1976); *Jurek v. Texas*, 96 S.Ct. 2950 (1976); *Gregg v. Georgia*, 96 S.Ct. 2909 (1976). *See also Furman v. Georgia*, 408 U.S. 238 (1972).

25. The right to a trial was considered fundamental even when Sixth Amendment guarantees were not expressly binding on the states. In *Palko v. Connecticut*, 302 U.S. 319, 327 (1937), the Court stated: "Fundamental too in the concept of due process and so in that of liberty, is the thought that condemnation shall be rendered only after trial."

In *Powell v. Alabama*, 387 U.S. 45 (1932), the Court described the right to counsel as being of a "fundamental character." *Id.* at 68. The Court has said of the Sixth Amendment right to counsel: "This is one of the safeguards * * * deemed necessary to insure fundamental human rights of life and liberty." *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938). It is now settled that Sixth Amendment rights can be abridged only in exceedingly narrow circumstances. *See, e.g., Faretta v. California*, 422 U.S. 806 (1975); *Taylor v. Hayes*, 418 U.S. 488 (1974); *Johnson v. Mississippi*, 403 U.S. 212 (1971); *Harris v. United States*, 382 U.S. 162 (1965).

26. These other constitutional guarantees include the right to self-representation, *Faretta v. California, supra*; the right to be presumed innocent and to have guilt proved beyond a reasonable doubt, *Mullaney v. Wilbur*, 421 U.S. 684 (1975); the right to the assistance of counsel, *Argersinger v. Hamlin*, 407 U.S. 25 (1972);

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If we were to read the due process clause literally, we would have to conclude that life could never be taken without a trial. Such a literal reading would fail to recognize the interests of the state in protecting the lives and safety of its citizens.

The District Court properly recognized that the situations in which the state can take a life, without according a trial to the individual whose life is taken, are to be determined by balancing the interests of society in guaranteeing the right to life of an individual against the interest of society in insuring public safety. It went on to hold that the task of determining how the balance should be struck was exclusively within the province of the legislature.[27] It is with the latter statement that we disagree.

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Gideon v. Wainwright, 372 U.S. 335 (1963); the right to a jury trial where the punishment exceeds imprisonment for six months, *Duncan v. Louisiana*, 391 U.S. 145 (1968); the right to compulsory process, *Washington v. Texas*, 338 U.S. 14 (1967); the right to confront accusing witnesses, *Pointer v. Texas*, 380 U.S. 400 (1965).

27. The rationale for the statutes permitting the use of deadly force is now largely discredited, but that alone generates little pressure for statutory change. The following comment made by Professor Tribe in discussing *Witherspoon v. Illinois*, 391 U.S. 510 (1968), is apropos:

> [I]t seems hard to deny that convicted murderers and the ad hoc groups that coalesce around their dramatic but passing causes make a singularly ineffective legislative constituency when compared with the continuing groups—such as policemen's benevolent associations—arrayed on the other side. However widely or intensely humane opinion may condemn the death penalty as cruelly excessive (and however great the percentage of death-scrupled jurors), it remains likely that more votes will be lost than won by the platform of abolition, or even by the platform of reforming the statutory law to allow death-scrupled jurors to sit on capital cases.
>
> And insofar as the death penalty is carried out too infrequently or discriminatorily to generate sustained political pressure for its repeal, legislative rigidity will be reinforced * * *.

Tribe, *Structural Due Process*, 10 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 269, 318-319 (1975) (footnote omitted).

The legislature has an important role to play in the balancing process, but the court has the ultimate responsibility to determine whether the balance struck is a constitutional one.

Because we deal with a fundamental right, the Missouri statutes can be sustained only if they protect a compelling state interest and are "narrowly drawn to express only the legitimate state interests at stake." *Roe v. Wade, supra* at 155. The state, in this case, must demonstrate the existence of an interest equivalent to, or greater than, the right to life to justify the use of deadly force against fleeing felons.[28]

Id. at 479, 116 Cal. Rept. at 238, 526 P.2d at 246 (citations omitted).

No such demonstration has been made here. Rather, the statute creates a conclusive presumption that all fleeing felons pose a danger to the bodily security of the arresting officers and of the general public.[29] The presumption is incorrect in its application to the facts of this case and has

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28. *See Story v. State*, 71 Ala. 329 (1882), and *People v. Ceballos*, 12 Cal.3d 470, 116 Cal. Rpt. 233, 526 P.2d 241 (1974). In *People*, which also involved a burglary, the court stated:

> Where the character and manner of the burglary do not reasonably create a fear of great bodily harm, there is no cause for exaction of human life. * * * The character and manner of the burglary could not reasonably create such a fear unless the burglary threatened or [was reasonably believed to threaten] death or serious bodily harm.

29. Statutes are subject to strict scrutiny when they contain a presumption that impinges upon fundamental rights. *Cleveland Board of Education v. LaFleur, supra; United States Dept. of Agriculture v. Murry*, 413 U.S. 508 (1973); *Vandis v. Kline*, 412 U.S. 441 (1973); *Stanley v. Illinois, supra; Bell v. Burson*, 402 U.S. 535 (1971); *Skinner v. Oklahoma, supra. See also* Tribe, *supra;* Note, *The Conclusive Presumption Doctrine: Equal Process or Due Protection?*, 72 MICH. L. REV. 800 (1974); Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534 (1974).

not otherwise been shown to be factually based.[30] We find nothing in this record, in the briefs of the parties or of the Attorney General, in scholarly literature, in the reports of distinguished study commissions, or in the experience of the nation's law enforcement agencies, to support the contention of the state that statutes as broad as these deter crime, insure public safety or protect life. Felonies are infinite in their complexity, ranging from the violent to the victimless. The police officer cannot be constitutionally vested with the power and authority to kill any and all escaping felons, including the thief who steals an ear of corn,[31] as well as one who kills and ravishes at will. For the reasons we have outlined, the officer is required to use a reasonable and informed professional judgment, remaining constantly aware that death is the ultimate weapon of last resort, to be employed only in situations presenting the gravest threat to either the officer or the public at large. Thus, we have no alternative but to find V.A.M.S. §§559.040 and 544.190 unconstitutional in that they permit police officers to use deadly force to apprehend a fleeing felon who has used no violence in the commission of the felony

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30. The Public Interest Law Center, of Philadelphia, completed a study of the use of firearms by Philadelphia policemen for the period 1970 through 1974. Among the conclusions that they reached were the following: approximately forty-five percent of the victims shot were unarmed; approximately forty-five percent of the victims were shot while fleeing from the police; in approximately one of four incidents, an unarmed victim was shot while fleeing; approximately fourteen percent of the victims shot were juveniles; and the police department consistently failed to discipline policemen who misused their firearms.

A study conducted by the Planning and Research Division of the Boston Police Department reveals police officers discharged their firearms in 210 cases between 1970 and 1973, 102 of the shots were in response to a fleeing suspect. In none of the 102 instances was there an assault on a police officer. In 80 of the cases, the fleeing suspect was unarmed.

31. *Storey v. State, supra* at 341.

and who does not threaten the lives of either the arresting officers or others.[32]

It is not for this Court to write new statutes for the State of Missouri. We can only say that the statutes would be constitutional if carefully drawn to limit the use of deadly force by law enforcement officers in the apprehension of fleeing felons to situations where the officer has a warrant or probable cause to arrest the felon where the felon could not be otherwise apprehended and where the

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32. We are also urged to invalidate the Missouri statutes on Fourteenth Amendment equal protection grounds and on the basis of the Eighth Amendment prohibition against cruel and unusual punishment.

The equal protection argument is that the state statutes permit deadly force to be used against all felons and denies its use as to misdemeanants. While this argument is not without merit, it seems to us that it misses the essential point.

> The real objection to the use of deadly force against non-violent felony suspects is not that such laws discriminate between non-violent felony suspects and misdemeanants, but that non-violent suspects are shot at all.

Comment, 11 HARV. CIV. RIGHTS-CIV. LIB. L. REV., *supra* at 379 (footnote omitted).

An additional equal protection challenge can be made upon the basis of the disproportionate use of deadly force against non-white suspects. *See* note 15, *supra* at 19.

In view of the mandate to judges to consider the proportionality and moral adequacies prescribed for criminal conduct, a good argument can be made for a decision on the basis of the Eighth Amendment. *But see Cunningham v. Ellington, supra; Wiley v. Memphis Police Dep't, supra;* and the court below, which all have held that an officer's use of deadly force to arrest is not punishment within the meaning of the Eighth Amendment as the arresting officer has no power to punish and may be violating the law if he seeks to do so. For detailed discussion of this problem, *see* Comment, 11 HARV. CIV. RIGHTS-CIV. LIB. L. REV., *supra* at 381-383.

It has also been suggested that statutes of this type can be held violative of the Fourth Amendment. We do not consider that approach, however, as it was not considered below and was not advanced on appeal. *See United States v. Birgnoni-Ponce,* 422 U.S. 873 (1975); *Cupp v. Murphy,* 412 U.S. 291 (1973); *Schmerber v. California,* 384 U.S. 757 (1966); Comment, 11 HARV. CIV. RIGHTS-CIV. LIB. L. REV., *supra* at 384-385.

felon had used deadly force in the commission of the felony, or the officer reasonably believed the felon would use deadly force against the officer or others if not immediately apprehended.

GIBSON, Chief Judge, dissenting, joined by STEPHENSON and HENLEY, Circuit Judges.

The majority opinion recognizes that the Missouri statutes at issue here are merely a codification of the common law dating from Fifteenth Century England[1] and that at least 24 states have similar codifications of the common law currently in force. After devoting two-thirds of its opinion to an analysis of the wisdom of the Missouri statutes, the majority disclaims authority to address that subject and declares the statutes unconstitutional. Thus, after a background of five centuries of the common law and two centuries of this country's existence, lo and behold the majority, *ipse dixit,* has held that the common law principles embodied in these Missouri statutes are violative of the Due Process Clause of our Constitution. While acknowledging that other courts have reached a contrary decision,[2] the majority shows no interest in the direction taken by other judicial authorities and turns elsewhere for guidance.

> [They] find nothing in this record, in the briefs of the parties or of the Attorney General, in scholarly literature, in the reports of distinguished study commissions, or in the experience of the nation's law en-

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1. The forerunner of the current Missouri statutes was Mo. Rev. Stat. art. 2, ch. 24, § 1235 (1885), which recognized homicide as justifiable, *inter alia,* "when necessarily committed in attempting by lawful ways and means, to apprehend any person for any felony committed * * *." This statute has been interpreted by the Missouri state courts as declaratory of the common law. *State v. Dierberger,* 96 Mo. 666, 10 S.W. 168 (1888).

2. See *ante* p. 25, n. 21.

forcement agencies, to support the contention of the state that statutes as broad as these deter crime, insure public safety or protect life.

The majority then refers to an "infinite" range of felonies and felons and concludes that it has "no alternative but to find V.A.M.S. §§ 559.040 and 544.190 unconstitutional * * *."

The majority's decision fails to recognize that Mo. Rev. Stat. § 544.190 (1969) only permits such force as may be reasonably necessary to apprehend a fleeing felon. The statute requires (1) that the arresting officer give a suspect notice of his intention to arrest, (2) that the suspect must either flee or forcibly resist, and (3) that whatever force the officer uses must be necessary. Furthermore, the officer must have probable cause to believe that the suspect has committed a crime. Thus, any unreasonable and unnecessary application of force would be arbitrary and an abuse of authority entailing proper sanctions against the officer.

Of course, the fact that a common law principle is of ancient origin and has withstood centuries of acceptance and become embedded in a state statutory scheme does not isolate it from criticism or make it immune to change. But the modification of state statutes involving questions of public policy is primarily within the province of the legislative branch and under our constitutional scheme of separation of powers judicial intervention in the process should be severely limited. Indeed, prior to this decision, no court has held that the modification of a statute of this sort falls within the judicial purview delimited by the separation of powers contained in our Constitution.

As noted by the District Court, under our Constitution, questions of public policy have been placed specific-

ally within the province of the legislative branch and not within that of the judicial branch, whose function is basically one of interpretation. The debate and writings alluded to in the majority opinion deal with and relate to suggested legislative changes in the common law provisions permitting the use of all reasonable and necessary force to effect the apprehension of a fleeing felon, such as those proposed in the Model Penal Code. I feel that the question of the dimensions of the Missouri statutes on the use of force to effect arrests is one that is clearly appropriate for the Missouri legislature and inappropriate for the federal courts. Indeed, as noted by the majority, 15 states have chosen to make legislative modifications of statutes on this issue. This is fully in keeping with our traditions, practices and principles of representative government. On the other hand, the majority does not cite, nor can I find, any state where the common law rule on the use of deadly force, either codified or uncodified, has been invalidated by either a state or federal court. Those courts faced with attacks on the common law rule allowing all force reasonably necessary to effect the arrest of fleeing or resisting felons have consistently held that these attacks present policy questions for the legislature, not the judiciary. *Jones v. Marshall,* 528 F.2d 132 (2d Cir. 1975); *Cunningham v. Ellington,* 323 F.Supp. 1072 (W.D. Tenn. 1971) (three-judge court); *Hilton v. State,* 348 A.2d 242 (Me. 1975); *Shumann v. McGinn,* 240 N.W.2d 525 (Minn. 1976).

As indicated, I find no justification for the majority's deviation from the approach taken by all other courts faced with this issue. Judicial self-restraint may not be relaxed by the simple expedient of labelling clear questions of public policy as questions of constitutional law. Most issues of public policy have constitutional implications, but they are not thereby automatically removed

from the legislative province and placed in the hands of the courts.

An examination of the history of the American Law Institute's experience in attempting to modify the common law rule on the use of deadly force to effect arrest also supports the conclusion that the issue at stake in the present case is one of public policy appropriate for the legislature, not the judiciary. In 1934 the ALI, in its First Restatement of Torts, modified the common law principle permitting the use of deadly force to effect the arrest of a felon. *Restatement (First) of Torts* § 131 (1934). This modification was abandoned in 1948, however, and the common law rule was readopted. The 1966 Appendix to the Second Restatement of Torts justifies this abandonment on the grounds that the modification contained in § 131 had, from its inception, lacked any support other than dicta and argument by analogy. Moreover, in 1966, no case could be found which had cited § 131 or had been in accord with it.

Significantly, however, the ALI's abandonment of proposed modifications of the common law rule on the use of deadly force was limited to the Restatement. In drafting the Model Penal Code, the ALI did not hesitate to propose that the common law rule be legislatively modified. According to the majority opinion, ante pp. 13-14 & n. 11, at least seven states have now chosen to legislatively adopt Model Penal Code § 3.07 on the use of deadly force in effecting an arrest. It is ironic that the majority, which cites the Model Penal Code extensively and clearly relies on Model Penal Code § 3.07 in suggesting what sort of statute it would consider proper, ignores the fact that the ALI drafted the Model Penal Code as a proposal of legislative, not judicial, modification of the common law. The majority would now judicially legislate it.

In the present case, the need for judicial restraint is particularly compelling in light of recent consideration of the problem by the Missouri legislature. In 1975 the Missouri legislature had before it a bill providing modifications of the common law based upon the Model Penal Code. The very fact that the Missouri legislature has so recently considered amending the statute now struck down by the majority indicates that Missouri is not oblivious to this area of public policy, which is in fact a sensitive one.

Indeed, the sensitivity of this issue is easily blurred by a single-minded focus on the seemingly absolute right of an individual to life. An individual's right to life is, however, beset with many obstacles, limitations and contradictions. Life is not permanent; it is subject to obliteration by accidents, inadvertance and by the hazards of everyday living. There is no constitutional right to commit felonious offenses and to escape the consequences of those offenses. There is no constitutional right to flee from officers lawfully exercising their authority in apprehending fleeing felons.

To measure the constitutionality of the Missouri statutes here, the individual's right must be weighed against the interests of the state. Rather than identifying the state interests involved here, however, the majority simply concludes that the state has failed to show an interest equivalent to the right to life. Thus, the majority balances a specific individual right to life against amorphous, unidentified state interests and, not surprisingly, finds the right to life to be weightier. I believe that the state's interests must be identified before a proper constitutional balancing can be made. These interests include effective law enforcement, the apprehension of criminals, the prevention of crime and the protection of members of the general populace, who, like fleeing felons, also possess a right to life.

Furthermore, I consider the majority's proposed modification of the common law rule a remarkably impractical means of balancing the interests and rights at stake. The majority states at page 35, *ante*, that:

> [S]tatutes would be constitutional if carefully drawn to limit the use of deadly force by law enforcement officers in the apprenhension of fleeing felons to situations where the officer has a warrant or probable cause to arrest the felon where the felon could not be otherwise apprehended and where the felon had used deadly force in the commission of the felony, or the officer reasonably believed the felon would use deadly force against the officer or others if not immediately apprehended.

This standard presupposes that law enforcement officers are endowed not only with foresight, but also with that most characteristic judicial vision, hindsight. The majority does not suggest how law enforcement officers are to make the on-the-spot constitutional analysis called for by its proposal and still react quickly enough to meet the exigencies of an emergency situation. How can a police officer ever know, reasonably or otherwise, whether the felon will use force against others if not immediately apprehended? It is clearly the prerogative of the state legislature to decide whether such restrictions on the use of force are consonant with public policy.

Ultimately it seems that we have at conflict the interest of the state in effectively bringing felony suspects to answer charges against them and the interest of the felony suspect in being brought to submission, if at all, with the greatest degree of protection of his safety. I think it is not our duty, upon the legislative facts before us, to balance those conflicting interests and if it is, I cannot agree that on balance the choice made by the legislature of Missouri is

an impermissible one. The state is not required to adopt a policy which might encourage the fleet of foot and the foolhardy felon or to reject a policy of apprehending suspects by use of all reasonable force.

For the foregoing reasons I am unable to join in the majority opinion.

A true copy.

Attest.

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1179

JOHN ASHCROFT, Attorney General,
State of Missouri,
Appellant,

—v.—

ROBERT DEAN MATTIS, M.D.,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MOTION TO AFFIRM

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

U. S. Constitution

Statutes

IN THE
SUPREME COURT OF
THE UNITED STATES

October Term, 1976

No. 76-1179

JOHN ASHCROFT, Attorney General,
State of Missouri,

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v.

ROBERT DEAN MATTIS, M.D.,

Appellee.

On Appeal From The
United States Court of Appeals
for the Eighth Circuit

MOTION TO AFFIRM

The appellee, Robert Dean Mattis, M.D., respectfully moves that this Court affirm the judgment of the United States Court of Appeals for the Eighth Circuit, entered in this action on December 1, 1976, on the grounds set forth herein.

OPINIONS BELOW

As brought out by appellant's statement, but not in his account of opinions below, there were two proceedings in the district court, each followed by an appeal to the Court of Appeals. The opinions of the United States District Court for the Eastern District of Missouri, in connection with the first proceeding, were not reported but are printed in the appendix of the first appeal, now certified to this Court, at pp. 15-30, 31, 34-36 and 37. The opinion of the United States Court of Appeals for the Eighth Circuit, reversing that judgment and remanding for a determination of the constitutionality of the challenged statute, is reported at 502 F.2d 588. The opinion of the District Court on remand following the second hearing is reported at 404 F.Supp. 643. The opinion of the Court of Appeals on the second appeal is reported at 547 F.2d 1007 and is set out in appellant's jurisdictional statement at pp. A1-A33.

JURISDICTION

Appellee does not question the present jurisdiction of this Court.

QUESTIONS PRESENTED

Appellee accepts appellant's formulation of the questions presented for review.

STATUTES INVOLVED

The statutes involved are correctly set forth in the Jurisdictional Statement. But we would note that the court of appeals limited its adjudication to that portion of the Missouri statute on justifiable homicide which provides as follows:

Revised Statutes of Missouri,

§559.040. Justifiable homicide. - Homicide shall be deemed justifiable when committed by any person in either of the following cases:

...(3) when necessarily committed in attempting by lawful ways and means to apprehend any person for any felony committed, or in lawfully supressing any riot or insurrection, or in lawfully keeping or preserving the peace.

STATEMENT

Appellee accepts the statement of appellant, with the following exceptions. The original complaint was actually filed on January 3, 1972. It is not clear what appellant means when he states that the opinion of the Court of Appeals on the first appeal, Mattis v. Schnarr, 502 F.2d 588 (8th Cir. 1974), which remanded the case for a determination of the validity of the statutes, was not contested. It is of course true that no review by this Court was then sought, and it probably would have been unavailable. But the Attorney General of Missouri, although he was not then a party to the litigation, filed an amicus curiae petition for rehearing or transfer to the court en banc, objecting to the suggestion in that opinion that he was free to intervene, which motion was denied by an even vote.[1/]

1/ On that first appeal, the Court of Appeals held that the appellee, Dr. Mattis, had standing to challenge the constitutionality of the deadly force statute pursuant to which authority his son was killed, and that the defenses of good faith and probable cause available to the officers would not bar declaratory relief. Accordingly, the Court of Appeals remanded the matter for a determination of the merits of that question.

(footnote continued next page)

That holding was correct. The appellee had standing because, as the Court of Appeals found, the operation of the statute directly infringed his constitutionally protected right relating to "the familial relationship between parent and child," 502 F.2d at 594-95, a right long recognized and given protection by this Court. See, e.g., Meyer v. Nebraska, 262 U.S. 390 (1923); May v. Anderson, 345 U.S. 528 (1923); Armstrong v. Manzo, 380 U.S. 545 (1965). "[W]here, as here, the result of ...[the operation of the statutes] was permanently to deprive a legitimate parent of all that parenthood implies," Armstrong v. Manzo, supra, 380 U.S. at 550, the aggrieved parent meets the basic condition of standing identified in and required by cases such as Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970) and Barlow v. Collins, 397 U.S. 159 (1970). The interest of Dr. Mattis was far more than "aesthetic, conservational, and recreational," Data Processing, supra, 397 U.S. at 154; rather his was a right "far more precious than property rights," May v. Anderson, supra, 345 U.S. at 533.

Similarly, the injury which Dr. Mattis suffered as a result of the statute's operation - the permanent loss of his son - made him an appropriate litigant to seek the declaratory relief rendered below. His injury was aggravated by the fact that his son's death was brought about in violation of the Constitution. That injury is and will continue to be mitigated by the judi-

(footnote continued next page)

cial declaration that the death was wrongful, and by the guarantee resulting from that declaration that his son did not die in vain and that other young men will not die in the same circumstances. Therefore, appellee properly has a stake in the outcome of this suit and in the relief granted, and the court below properly concluded that the appellee's interests presented the appropriate occasion for adjudicating the constitutionality of the challenged statute.

THE QUESTIONS ARE NOT SUBSTANTIAL AND THE JUDGMENT APPEALED FROM SHOULD BE AFFIRMED.

The holding of the Court of Appeals is that the Missouri statutes which authorize the use of deadly force against all suspected felons fleeing from arrest, but not against any fleeing misdemeanants, are "unconstitutional as applied to arrests in which an officer uses deadly force against a fleeing felon who has not used deadly force in the commission of the felony and whom the officer does not reasonably believe will use deadly force against the officer or others if not immediately apprehended." (J.S. A2-A3). This holding is compelled by the decisions of this Court in the death penalty cases and other cases, is consonant with sound, modern law enforcement practices, and is not in conflict with other lower court decisions.

1. The Judgment Rests on a Solid Precedential Foundation.

Appellant staunchly presses the district court's assertion that the right to life was not involved in this case, in which appellee's son was shot to death, and that the statutes placed their burden not upon life but upon flight from a lawful arrest. Then he clings to his own argument that to hold that the right to

life is denied by the Missouri statutes ties the court's opinion to the particular outcome of a particular case (J.S. 7). All this is offered in the face of statutes that authorize deadly force, which was used, and which killed. The Court of Appeals correctly disposed of the district court's transparent fallacy by noting that the question was not whether Michael Mattis had a right to burglarize the golf driving range and then flee - concededly he did not - but whether his life could be taken without due process once he did so (J.S. A19-20, n. 22). The bullet did stop the flight, but it killed Michael Mattis. And, of course, the Court of Appeals dwelt on the fundamental right to life and its deprivation here (J.S. A19-A23). Similarly, appellant's argument that policemen acting under the statutes do not necessarily or always kill fleeing felons whom they cannot catch supports appellee's argument that police practice in this respect is indeed capricious, thus coming directly under the ban on such state-inflicted death pronounced by Furman v. Georgia, 408 U.S. 238 (1972). That same case, decided when only nine states had permanently abolished capital punishment, also effectively answers the contentions that never before has a court so contravened the legislative will as the Court of Appeals did in this case.

As that court observed (J.S. A22), the recent death penalty cases of this

Court established that the Constitution permits the taking of life by the state as punishment for certain aggravated forms of murder, but only under "a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance." Gregg v. Georgia, ____ U.S. ____, 49 L.Ed.2d 859, 887 (1976). By the same token, if a policeman is to take an offender's life, he must be given some better guidance than is afforded by the bare word "felony," which has lost all its intrinsic significance, and the scope of which he cannot be expected to know or remember. Appellant suggests "that the proper standard is whether the application of force exceeds what is reasonable and necessary under the circumstances." (J.S. 7). But, as the Court of Appeals noted (J.S. A7), deadly force was "reasonably necessary" in this case on the assumption that Michael Mattis had to be brought down at all costs; but to make such an assumption is simply to beg the question. "[T]he fundamental respect for humanity underlying the Eighth Amendment...requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of inflicting the penalty of death." Woodson v. North Carolina, ___ U.S. ___, 49 L.Ed. 2d 944, 961 (1976).

The paramount importance of human life means that deadly force is never warranted for an offense solely against property, and that no policeman, in his sole discretion, should be allowed to decide to the contrary. In any event, once it is recognized that policemen cannot, should not, and do not follow the guideline of felony as against misdemeanor, which appellant seems to acknowledge by way of his "reasonable and necessary" formula, then some other guideline must be given them. In the first instance, formulation of any guideline is for the legislature. But when the formulation fails to pass constitutional muster, it must be declared invalid in a judicial proceeding. As Mr. Justice Black observed, concurring in Gregory v. City of Chicago, 394 U.S. 111, 120 (1969): "...under our democratic system of government, lawmaking is not entrusted to the moment-to-moment judgment of the policeman on his beat."

If under the decisions of this Court the state legislature cannot take human life by the imposition of a mandatory formula, no matter how detailed its provisions, Roberts v. Louisiana, ___ U.S. ____, 49 L.Ed.2d 974 (1976), then certainly it cannot do so by using the shibboleth "felony." The fact that in practice the police capriciously follow or ignore that shibboleth only makes the situation that much worse under Furman.

Also of great importance here is the recognition since Weems v. United States, 217 U.S. 349 (1910), that the punishment must be proportionate to the crime. Death is "an extreme sanction, suitable to the most extreme of crimes," Gregg v. Georgia, supra, ___ U.S. ___, 49 L.Ed.2d at 882. Indeed, as Mr. Justice Rehnquist conceded in Woodson v. North Carolina, supra, 49 L.Ed.2d at 965: "If this case involved the imposition of the death penalty for an offense such as burglary or sodomy, ... the virtually unanimous trend in the legislatures of the States to exclude such offenders from liability for capital punishment might bear on the plurality's Eighth Amendment argument." (emphasis added). The Court of Appeals properly concluded that the sweeping authorization of deadly force embodied in this statute does not conform to the principles applied in this Court's death penalty cases.2/

2/ While this Court employed the Eighth Amendment in the death penalty cases, the Court of Appeals decided this case primarily under due process, although it utilized doctrines developed in the areas of cruel and unusual punishment and equal protection. Appellee also presented Eighth Amendment arguments to the court below, and Howell v. Cataldi, 464 F.2d 272 (3rd Cir. 1972), cited with approval by appellant, holds that in constitutional terms it is possible for cruel and unusual

(footnote continued next page)

Appellant accuses the Court of Appeals majority of failing to recognize the valid state interests involved. To the contrary, the court indeed recognized those interests, analyzed them extensively, but concluded that this sweeping statute was not necessary to serve such interests:

> We find nothing in this record, in the briefs of the parties or of the Attorney General, in scholarly literature, in the reports of distinguished study commissions, or in the experience of the nation's law enforcement agencies, to support the contention of the state that statutes as broad as these deter crime, insure public safety or protect life (J.S. A25).

Stripped to its essentials, the interest of the state served by these statutes is that no suspected offender whose offense has been labeled a felony

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punishment to be inflicted by the police on an arrested person before trial. What must be seen here is that once the policeman determines that he cannot overtake the fleeing felon and decides to shoot him, he is punishing him. If he only wounds him, he may also accomplish his legitimate purpose of bringing him to trial; but if he kills him, it is punishment pure and simple. And that is what happened to Michael Mattis.

shall escape trial. That interest weighs something, even for the pettiest felony, but for the felony of breaking into a small unoccupied office to steal the small change presumably there, does it outweigh the value of a human life? Appellant cannot bring himself to say so, and instead in this wrongful death case he mulishly refuses to see any involvement of human life. He fails to put anything at all on the appellee's side of the scales, even though our constitutional heritage is informed by the understanding that there are higher values than perfectly effective law enforcement. The Court of Appeals properly balanced the competing societal interests and reached the valid conclusion that the authorization of deadly force in this situation unconstitutionally tipped the balance against the individual. The exact same balance was struck by Mr. Chief Justice Burger who once drew an analogy that perfectly fits this case:

> I wonder what would be the judicial response to a police order authorizing "shoot to kill" with respect to every fugitive. It is easy to predict our collective wrath and outrage. We, in common with all rational minds, would say that the police response must relate to the gravity and need; that a "shoot" order might conceivably be tolerable to prevent the escape of a convicted killer but surely not for a car thief, a pickpocket or a shoplifter.

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 419 (1971)(dissenting opinion).

Finally, the decision below is also sustainable under an equal protection analysis.[3] In at least four cases this Court has refused to let rights in the criminal justice process hinge on the meaningless present-day distinction between felonies and misdemeanors: Carroll v. United States, 267 U.S. 132 (1925); Groppi v. Wisconsin, 400 U.S. 505 (1971); Mayer v. City of Chicago, 404 U.S. 189 (1971); Argersinger v. Hamlin, 407 U.S. 25 (1972). This ground as well, although not explicitly reached by the Court of Appeals, is sufficient to sustain the judgment.

2. Contrary Opinions Are Too Weak to Present a Conflict.

Appellant asserts that there is a broad array of authority against the Court of Appeals in this case. Upon close examination, however, there is no true conflict.

3/ Of course the Court of Appeals did not call this "the wildest argument," nor did appellant mean to say so, as he did at J.S. 10. The quoted words are clearly a phonetic misprint for the phrase, "that while this argument" was not without merit, it did not have to be reached. See J.S. App. A26, n. 32.

For example, while the appellant claims that the Second Circuit upheld the constitutionality of statutes similar to those of Missouri in Jones v. Marshall, 528 F.2d 132 (2d Cir. 1975), in fact that court, although asked to pass on that question, expressly declined to do so, 528 F.2d at 136, n. 9. Similarly, while the three-judge court in Cunningham v. Ellington, 323 F.Supp. 1072 (W.D. Tenn. 1971), sitting in the Sixth Circuit, upheld the constitutionality of a statute identical to R.S.Mo. §544.190, it did so in a painfully cavalier and superficial manner. Nevertheless, that opinion was deferentially followed without further discussion by the Sixth Circuit in Beech v. Melancon, 465 F.2d 425 (6th Cir. 1972), but with reservations expressed by Circuit Judge McCree in a concurring opinion.

Appellant also cites Wiley v. Memphis Police Department, ___F.2d___ (6th Cir. 1977, No. 75-2321), which was decided on February 10, 1977. Although there might appear to be a conflict between the decision below and the Sixth Circuit Wiley case, the latter court, having the Mattis decision before it with all its closely reasoned constitutional analysis, answered none of it. Instead, that court engaged in an angry diatribe against the Eighth Circuit for presuming to set the Constitution against the ancient acts of a legislature, and for putting policemen

under that Constitution instead of leaving them free to use their best judgment as the occasions arise. Once again, Judge McCree concurred with reservations, but this time because, as he said, "I do not regard this appeal as requiring us to decide whether the rule that permits a police officer to use deadly force to apprehend a fleeing felon when there is no threat to human life is constitutional." Slip op. at 18. His reason for concluding that the constitutional issue was not before that court was the evidence in the record that the fleeing burglars had presented an apparent threat to human life (for example, they had stolen some guns), and the opinion is permeated by suggestions to that effect, although that conclusion was strongly contested. Thus the last word of the Sixth Circuit is short of a definitive constitutional ruling, since no one here questions the use of deadly force when such a threat is made.

Similarly, appellant cites common law cases upholding the very common law rule under attack, which should come as no surprise, and which carry no authority for construing the Constitution. Even so, however, the proclaimed unanimity does not exist. In Schumann v. McGinn, 240 N.W.2d 525 (Minn. 1976), for example, a five-to-four majority of the court voted in favor of adopting as Minnesota common law the Model Penal Code rule, which is substantially the same as that constitutionally required by the Eighth Circuit

in this case. But one of the five declined to make the new rule effective immediately. And in Hilton v. State, 348 A.2d 242 (Maine, 1975), a civil case, the court declined to impose the Model Penal Code rule as the common law of Maine, but the court observed, 348 A.2d at 245, note 4, that the Maine legislature had adopted it after the events in that case. On the other hand, as far back as 1935, the Supreme Court of Virginia in Hendricks v. Commonwealth, 163 Va. 1102, 178 S.E. 8 (1935), changed or shaped its common law to make it substantially fit the standard now proclaimed in the Eighth Circuit.

Moreover, the reluctance of courts to impose new standards on the parties before them had much to do with the decisions in Beech, Wiley, Schumann, and Hilton, and, indeed, that reluctance, insofar as it applies to damages, is presumably justified by this Court's decision in Pierson v. Ray, 386 U.S. 547 (1967). But that case and those considerations have no bearing whatsoever on the availability of declaratory relief.

In short, the conflict in decisions upon which the appellant relies is more apparent than real. The decision below was carefully reasoned, anchored firmly in the principles of this Court's death penalry decisions, and should be summarily affirmed.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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April 1977

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1179

JOHN ASHCROFT, Attorney General,
State of Missouri,
Appellant,

v.

ROBERT DEAN MATTIS, M.D.,
Appellee.

On Appeal from the United States Court of Appeals
for the Eighth Circuit

PETITION FOR REHEARING

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TABLE OF CONTENTS

Table of Authorities

Cases

U. S. Constitution

Statutes

Textbooks

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PETITION FOR REHEARING

The appellee, Robert Dean Mattis, M. D., respectfully petitions this Court for a rehearing of the judgment and *per curiam* opinion of this Court entered on May 16, 1977, vacating the judgment of the United States Court of Appeals for the Eighth Circuit entered on December 1, 1976, reported at 547 F.2d 1007, on the grounds set forth herein.

I. The Decision Went on a Procedural Point Not Raised by Appellant and Not Briefed or Examined for Its Fairness or Consequences.

Because the decision of this Court went on a procedural point not raised by appellant and therefore only cursorily treated by appellee, the decision overlooks a matter of paramount importance: the constitutionality of statutes authorizing the use of deadly force in arresting any and all felons should be subject to judicial review, but under this decision that those aggrieved by the use of such deadly force do not have sufficient interest to sue for declaratory judgments, the statutes never can be tested. This result springs directly from this Court's decision in *Pierson v. Ray*, 386 U.S. 547 (1967) barring the remedy of damages against police officers who acted in reliance on statutes not theretofore declared unconstitutional. When this Court held in that case "that a police officer is not charged with predicting the future course of constitutional law," (386 U.S. at 557), it did not mean that constitutional law in that field should *have* no future course, but that is the unintended effect of the *per curiam* in this case.[1] When the plaintiff asks for damages for conduct authorized by statutes he wishes to attack, he is denied damages because of the defendants' good faith reliance on the statutes. When he thereupon turns his attack on the statutes themselves, he is told that since he has ceased to ask for damages the question he presents is hypothetical and not a case for controversy.

This is best described as whipsaw treatment. It was most recently condemned by Mr. Chief Justice Burger when attempted by the State of New Hampshire in another case under 42 U.S.C.

[1] From all that appears this Court might well have allowed declaratory relief in *Pierson*, but the peculiar chain of events therein precluded that possibility: this Court already had invalidated the statute there involved in another case after the arrests were made in *Pierson*, and hence had no occasion to pass on the statute's validity in *Pierson*. (But it did allow the claim for damages to stand on another ground.)

§ 1983, *Wooley v. Maynard*, — U.S. —, —, 97 S.Ct. 1428, 1434, n. 9 (4/20/77). Referring to a husband and wife who wished to attack a statute on identical grounds, the State told the husband that he was too late and the wife that she was too early, but this Court brushed aside such obstruction, noting that it would never "leave room for federal intervention under § 1983." Similar tactics were denounced by this Court under the very name of "whipsaw" in *Murphy v. Waterfront Commissioners*, 378 U.S. 52, 55 (1964).

II. The Decision Precludes Future Determination of the Constitutionality of Statutes on the Use of Deadly Force by Police.

Usually a statute affecting the criminal justice process can be tested in defending against a prosecution, but not the statutes here involved. No policeman can be prosecuted under these statutes for shooting a fleeing petty felon.[2] If a policeman shoots a fleeing misdemeanant he can be prosecuted, but then only the immunity given misdemeanants can be tested, and that test would be solely for the benefit of the policeman. And if the fleeing petty felon survives being shot, he is in no better position than the father of a dead one, because he will not be heard to say in court that he is going to commit another petty felony and run away and might be shot again. *O'Shea v. Littleton*, 414 U.S. 488 (1974). Only if a defendant fails to plead good faith reliance on the statutes could a suit for damages survive the initial round. But that failure could be corrected as plain error as the case progressed, because a defendant's reliance on a statute is implicit in a plaintiff's attack on the statute, and must actually be made explicit in a case brought under § 1983, where a plain-

[2] Nor could he be even under the statutes as restricted in their operation by the Court of Appeals, because appellee concedes, as he must, that that court's opinion touches R.S.Mo. §559.040 on justifiable homicide only as that statute affects civil law, not criminal liability, and the other statute involved, §544.190, has nothing to do with criminal liability.

tiff must allege that defendant acted under color of a state law or statute.[3] A simple suit for damages might slip by if the plaintiff ignored the statute and the defendant was not well enough advised to plead it, but that would be no test of the statute, and the chance of obtaining such slipshod justice is no substitute for a forthright confrontation of the issue.

In *Eisenstadt v. Baird*, 405 U.S. 438, 445-446 (1972), this Court said, "The very point of Baird's giving away the vaginal foam was to challenge the Massachusetts statute that limited access to contraceptives," yet it let him prevail in his challenge because the recipients of the contraceptives, just like policemen and of course the plaintiff in the instant case, were not subject to prosecution under the statute and hence could not test it in that way, saying "to that extent, [they] are denied a forum in which to assert their own rights." See also the cases cited there in the text and in note 6. That was a put-up case, but plaintiff did not put up the case of Michael Mattis. Surely he must be allowed to test the statutes that deprived him of his son. The point being ruled in *Eisenstadt* was purely one of standing, whereas here the point seems to be a mixture of standing and justiciability, but the same relaxation should be allowed with respect to the point here involved (the *Pierson* good faith rule), so close to that of pure standing: namely, a rule designed to keep certain defendants, rather than plaintiffs, out of court, but only to protect such defendants when they acted in good faith and need protection from substantial damages, which the defendants in this case never needed, and now they need no protection at all since they are no longer even actively in the case.

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[3] In enacting the predecessor to §1983, the Reconstruction Congress recognized that people can suffer from bad laws just as much as from bad administrators. See *Monroe v. Pape*, 365 U.S. 167, 173 (1961) and Part III *infra*.

III. The Court's Dismissal of the Case as Hypothetical Amounts to Finding Lack of Justiciability and Standing, But These Elements Exist Here Under Accepted Doctrine.

This Court in its *per curiam* in this case says that the fatal flaw was asking the District Court "to answer the hypothetical question whether the defendants would have been liable apart from their defense of good faith." Put this way, the point sounds like one of pure justiciability. But the Court then says, "No 'present right' of appellee was at stake." This is language on the point of standing, and appellee submits that only if the latter quotation is necessarily true can it be said that plaintiff asked the Court a hypothetical question. For if plaintiff had a "present right" to attack the statutes, which were the real source of his injury, then the hypothesis about the policemen, whom he didn't want to attack anyway, drops out of the picture.

And so we come to the question of standing, which appellee barely touched upon in his motion to affirm since appellant did not raise it at all,[4] and which this Court disposed of in short order, without the benefit of briefs and apparently without awareness of the havoc thereby wreaked on judicial review in this field. The traditional test for standing, harm to plaintiff, was passed by this plaintiff beyond dispute through the death of his son. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970); *Barlow v. Collins*, 397 U.S. 159 (1970). This Court still held that ". . . whatever else the 'case or controversy' requirement embodied, its essence is a requirement of 'injury in fact' " in *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 218 (1974), and adhered to the same test, variously expressed but with nothing more added, in *United States v. Richardson*, 418 U.S. 166, 179-180 (1974).

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[4] Nor was the upholding of standing by the Court of Appeals on the first appeal, 502 F2d 588 (1974), challenged in the dissenting opinion written at that time. From then till now it has been out of the case.

The more difficult question is whether the *remedy* sought and obtained by appellee from the Court of Appeals, a declaratory judgment invalidating the Missouri statutes, is sufficiently concrete to satisfy more recent pronouncements of this Court. In its *per curiam* in this case, this Court has ruled that it is not, and that is the crucial issue that must be decided. Appellee urges that it be given closer consideration in the light of its extraordinary importance as explained herein.

Warth v. Seldin, 422 U.S. 490 (1975) is one of the newer cases on standing positing the need for a concrete remedy. Yet even that case seems to regard the constitutional dimension of standing as requiring only palpable injury to the plaintiff, whereas the other limitations on standing are treated as merely "prudential" (422 U.S. at 498-499). This Court ruled, 422 U.S. at 501:

> . . . Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of course, Article III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants. [Citation omitted.] But so long as this requirement is satisfied, persons to whom Congress has granted a right of action, either expressly or by clear implication, may have standing to seek relief on the basis of the legal rights and interests of others, and, indeed, may invoke the general public interest in support of their claim. [Citations omitted.]

It is submitted that Congress made just such a grant when it enacted the predecessor to § 1983, thereby providing that every person deprived of a constitutional right under color of a state statute is entitled to redress in a ". . . suit in equity, or other proper proceeding," which would certainly include, besides an injunction, the newer and milder remedy of a declaratory judgment. In *Monroe v. Pape*, 365 U.S. 167, 173 (1961), this Court

said of § 1983, "*First*, it might, of course, override certain kinds of state laws." Section 1983 is structurally connected with, and largely dependent upon, an opposition to state laws. Here is a Congressional grant of a right of action to challenge state laws which should remove all the "prudential standing rules," leaving only the requirement of injury, which abundantly exists in this case.

It is true that in *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 39 (1976) this Court stated, "The necessity that the plaintiff who seeks to invoke judicial power stand to profit in some personal interest remains an Article III requirement." This leaves open the nature of that "personal interest," to be discussed below. The actual holding, however, is that the plaintiff organization could establish standing only by showing injury to its members, some of whom were also plaintiffs, and that those plaintiffs, though injured, had sued the wrong defendant. In its most concrete form, the remedy sought by appellee here is the cessation of the practice of shooting fleeing petty felons. But the persons who will fit that description, although they certainly exist, cannot even be identified, let alone being joined as plaintiffs, and their interest is purely *in futuro*. Thus appellee cannot be held to be seeking relief for third parties, and the relief he seeks for himself, invalidation of the statutes, is as concrete as the nature of this case will permit.

Of course, as pointed out in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, — U.S. —, —, 97 S.Ct. 555, 562 (1977), "economic injury is not the only kind of injury that can support a plaintiff's standing." In that case the injury was to an interest in making low-cost housing available where needed, which, when viewed apart from the profit motive as it was by this Court in that case, is largely philanthropic. In *Data Processing, supra*, 397 U.S. at 154, this Court gave as examples of sufficient interest those which are "aesthetic, conservational, and recreational," and pointed out

that a spiritual stake is sufficient to give standing to raise issues concerning the Establishment Clause and the Free Exercise Clause of the First Amendment, under the authority of *Abington School District v. Schempp*, 374 U.S. 203 (1963). The interest of Dr. Mattis that was injured is more than aesthetic, is somewhat philanthropic, and is also more than simply emotional, as this Court has characterized it. It is really spiritual, the belief in the sanctity of the family that endures past death.[5] It was not mere ornamentation when the Court of Appeals quoted from the One Hundred and Twenty-Seventh Psalm, 502 F2d at 594 (citation misprinted as Psalm 27). This belief is attacked and badly shaken when the courts deny plaintiff any relief and appear to proclaim that Michael Mattis was killed rightfully and in keeping with the Constitution of the United States. Although Mr. and Mrs. Maynard were more acutely in need of relief in *Wooley v. Maynard, supra*, than Dr. Mattis, their *interest* in preserving their spiritual sensibilities from affront by a slogan deemed profane is much the same as that of Dr. Mattis in being freed from the judgment that his son was justly dispatched as a public enemy.

IV. Lack of Standing in All Other Persons Requires According of Standing to This Injured Plaintiff in a Private Dispute With Great General Significance.

Appellee has argued herein that if he has no standing to maintain this suit, then no such suit can be maintained. It is true that this Court stated in *Schlesinger v. Reservists Committee, supra*, 418 U.S. at 227:

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[5] The sanctity of the family has just been recognized again by this Court in *Moore v. City of East Cleveland*, 45 U.S.L.W. 4550, 4552 (5/31/77), pointing out that in *Viliage of Belle Terre v. Boraas*, 416 U.S. 1 (974) it upheld an ordinance that limited the types of groups that could occupy a single dwelling unit but promoted "family needs" and "family values," 416 U.S. at 9, whereas in the case before it, "East Cleveland, in contrast, has chosen to regulate the occupancy of its housing by slicing deeply into the family itself," and hence it struck down the East Cleveland ordinance.

> The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing. See *United States v. Richardson*, 418 U.S. at 179.

But *Schlesinger* was a suit to bar members of Congress from holding commissions in the Armed Forces Reserve, and *Richardson* sought to compel the Secretary of the Treasury to publish an accounting of the receipts and expenditures of the Central Intelligence Agency. At the place cited above in *Richardson*, this Court said:

> In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process. Any other conclusion would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts.

None of the above has anything to do with the use of deadly force by a peace officer against a private citizen. No one would suggest that the Founding Fathers intended that subject matter to be kept out of court. And, while the power of judicial review of Acts of Congress had to be searched for by Chief Justice Marshall in *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803), the Founding Fathers made it abundantly clear in Article VI that *state* laws were to be tested against the Constitution by "the judges in every State."

If the *per curiam* in this case merely disposed of a particular case for the manner in which it was brought, even though the subject matter is life and death, perhaps no further consideration would be warranted. But where the Court has foreclosed from future consideration the whole field of the use of deadly force by police, a field in which senseless sacrifices and mount-

ing antagonisms are daily events, without briefing or argument and in a manner that must be regarded as inadvertent, then surely the Court should call for plenary presentation and another look.

Respectfully submitted,

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Certificate

I certify that the foregoing petition is presented in good faith and not for delay.

Eugene H. Buder